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In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

ARTHUR EDWARD SHEEHAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

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The Solicitor General, on behalf of the Army and Air Force Exchange Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 619 F.2d 1132.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 18a-19a) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (App. D, *infra*, 20a-21a). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth at App. E, *infra*, 22a-35a.

STATEMENT

On March 16, 1976, respondent was serving as an appointed managerial employee of the Army and Air Force Exchange Service (AAFES) at Fort Jackson, South Carolina.[1] On that date, respondent received notice of separation for cause based upon certain acts of misconduct off the job that allegedly reflected discredit upon the AAFES and rendered his continued employment incompatible with the best interests of the AAFES.[2] Respondent's discharge was sustained upon administrative review (App. A, *infra*, 1a-4a).

Respondent then brought this action in the United States District Court for the Northern District of Texas, alleging that his discharge was procedurally defective, arbitrary, capricious, unsupported by sub-

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[1] The AAFES is a nonappropriated fund instrumentality, which means that it does not receive its monies by congressional appropriations. See 10 U.S.C. 4779(c), 9779(c).

[2] On November 18, 1975, respondent was arrested for violation of state drug laws and on March 1, 1976, he pleaded guilty in state court to four counts charging him with possession of various illegal drugs (Complaint ¶ 8; Ex. A).

stantial evidence, an abuse of discretion, in excess of statutory authority, and in violation of his constitutional rights (App. A, *infra*, 4a). Respondent sought, *inter alia*, monetary damages including back pay (Complaint ¶¶ 20, 25).[3] The district court dismissed the suit for lack of subject matter jurisdiction (App. B, *infra*, 17a).

The court of appeals reversed (App. A, *infra*, 1a-16a). It held that the requisite jurisdiction over respondent's claims for monetary relief was provided by the 1970 amendment to the Tucker Act, 28 U.S.C. 1346(a)(2), which confers jurisdiction over claims founded upon express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES (App. A, *infra*, 6a-9a). The court acknowledged the AAFES' argument that respondent's action could not be based on a breach of contract theory because under governing regulations respondent served by appointment rather than by contract (*id.* at 7a-8a). But the court concluded that "[e]ven if the regulations label the *commencement* of [respondent's] employment as pursuant to 'appointment,'" the AAFES' regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to the regulations in its dealings with him" (*id.* at 8a; emphasis in original). Accordingly, the court ruled that respondent's allegation that his discharge violated controlling regulations was equivalent to an allegation of a breach of an implied-in-fact contract and that such a claim was sufficient under the Tucker Act to

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[3] Respondent also sought nonmonetary relief, including reinstatement, accrued vacation time and sick leave.

avoid dismissal on jurisdictional grounds (App. A, *infra*, 9a).[4]

REASONS FOR GRANTING THE PETITION

The court of appeals has held in this case that because of the existence of exchange service regulations setting forth discharge procedures, an appointed exchange service employee has an implied-in-fact contract with the exchange service that entitles him, upon his discharge, to bring suit for money damages under the Tucker Act on the ground that his discharge was processed in violation of the applicable regulations. This holding is foreclosed by this Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976). In *Hopkins*, the Court drew a clear distinction between "contract" and "appointed" exchange service employees and held that only the former may sue the United States for wrongful discharge under the Tucker Act. In *Testan*, the Court held that federal employees who alleged that they had been improperly classified under Civil Service personnel regulations could not sue the United States for damages under the Tucker Act because even if the employees' substantive rights had been violated, the mere existence of a substantive right, without an explicit grant of entitlement to monetary relief for violation of that right, does not create the necessary waiver of sovereign immunity. Under the court of appeals' anal-

[4] The court of appeals also held that the district court had jurisdiction over respondent's claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (App. A, *infra*, 10a-15a). We do not seek review of this aspect of the court of appeals' decision.

ysis in this case, however, the employees in *Hopkins* and *Testan* would have had valid damage actions against the United States based on a breach of an implied-in-fact contract.

If the decision of the court of appeals is permitted to stand, the United States will be subjected to claims for money damages that were plainly not contemplated by Congress when it enacted the Tucker Act and when it amended that Act in 1970. In light of the manifest error of the decision below and the significance of the issue concerning the scope of federal court jurisdiction under the Tucker Act, review by this Court is warranted. However, because the outcome of this case is clearly controlled by the decisions in *Hopkins* and *Testan*, we believe that summary reversal would be appropriate.

1. The court of appeals correctly recognized (App. A, *infra*, 5a-7a) that the decision in this case turns on whether the United States has waived sovereign immunity to suit for money damages by a former AAFES employee alleging that he has been improperly discharged. As this Court recently reiterated in *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980):

> It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969).

Such unequivocal expression must be found in a constitutional provision, statute or regulation that cre-

ates a substantive right against the United States for money damages or in a contract entered into by the United States. *Eastport S. S. Corp.* v. *United States*, 372 F.2d 1002, 1007-1009 (Ct. Cl. 1967). Because the Tucker Act is itself only a jurisdictional statute that does not create such an enforceable substantive right, it is necessary to look elsewhere to find the requisite waiver of sovereign immunity. See *United States* v. *Testan*, *supra*, 424 U.S. at 398. There is no constitutional provision, statute or regulation creating a substantive right, enforceable against the United States, to money damages for improper discharge from a military exchange. Neither the regulations governing employment in the Army and Air Force Exchange Service nor the statutes pursuant to which those regulations were promulgated create a substantive right to compensation from the federal government for wrongful discharge. Indeed, in 5 U.S.C. (Supp. II) 2105(c), Congress explicitly denied this right to exchange service employees by excluding them from coverage of certain laws administered by the Office of Personnel Management, including the Back Pay Act (5 U.S.C. (& Supp. III) 5596).[5]

Furthermore, a right to damages in this case cannot be founded upon an express or implied contract. Prior to 1970, this proposition was undisputed, be-

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[5] 5 U.S.C. (Supp. II) 2105(c) provides in pertinent part:

> An employee paid from nonappropriated funds of the Army and Air Force Exchange Service * * * is deemed not an employee for the purpose of—
>
> (1) laws * * * administered by the Office of Personnel Management * * *.

The Back Pay Act, 5 U.S.C. (& Supp. III) 5596, is administered by the Office of Personnel Management (see 5 U.S.C. (Supp. III) 5596(c)).

cause contracts with military exchanges were not contracts "with the United States." In *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942), this Court observed that, although the military exchanges are "arms of the Government" and "integral parts of the War Department," the "Government assumes none of the financial obligations of the exchange." Thereafter, in a series of decisions [6] the Court of Claims held that because the government had assumed no liability for the financial obligations of the military exchanges, it could not be said to have consented to be sued on such obligations and, accordingly, no "claim against the United States" existed under the Tucker Act.

In 1970 Congress took steps to remove this perceived inequitable "loophole" [7] by amending the Tucker Act (Pub. L. No. 91-350, Section 1(a), 84 Stat. 449), to provide that:

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The Court in *United States* v. *Hopkins*, *supra*, considered the effect of this amendment on monetary

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[6] *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Cl. 1953); *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Cl. 1958); *Kyer* v. *United States*, 369 F.2d 714 (Ct. Cl. 1966), cert. denied, 387 U.S. 929 (1967).

[7] S. Rep. No. 91-268, 91st Cong., 1st Sess. 2 (1969); H. R. Rep. No. 91-933, 91st Cong., 2d Sess. 2 (1970).

claims advanced by discharged military exchange employees.

In *Hopkins*, an AAFES employee, claiming wrongful discharge, brought suit in the Court of Claims for money damages under the 1970 amendment to the Tucker Act. The government moved to dismiss the action for lack of subject matter jurisdiction. The Court of Claims ruled, however, that it had jurisdiction based upon an express or implied contract of employment. *Hopkins* v. *United States*, 513 F.2d 1360 (Ct. Cl. 1975).

This Court vacated and remanded to the Court of Claims, finding that that court had erred in assuming, without a sufficient examination of the applicable regulations, that Hopkins held his position by "contract" rather than by "appointment." 427 U.S. at 127, 130. The Court compared the status of "ordinary" employees of the AAFES, who are hired under one set of Army and Air Force regulations, with the status of "service contract" employees, who are hired under another totally different set of Army and Air Force regulations. The Court determined that "ordinary" employees serve by appointment, while others who perform "direct services" on or off the military bases, such as "janitorial and window cleaning service," are hired by contract. And it pointed out that the two categories are mutually exclusive, since the governing regulations expressly prohibit "exchange employees" from receiving service contracts. 427 U.S. at 127-129.

The Court concluded that the 1970 amendment to the Tucker Act was applicable to employment contracts as well as to contracts for goods and services and that AAFES *contract* employees thus have a right to sue for wrongful discharge in the Court of

Claims. 427 U.S. at 126. However, the Court reached a different conclusion with respect to "ordinary" AAFES employees, who hold their positions by *appointment.* It noted that while Congress had granted appointed exchange employees many of the privileges enjoyed by appointed federal employees, under 5 U.S.C. 2105(c) it had expressly excluded them from the coverage of the Back Pay Act. 427 U.S. at 128. The Court also noted that when Congress amended the Tucker Act in 1970 it did not change any of the provisions of the United States Code dealing with exchange employees nor did it require that the exchanges employ all persons pursuant to contract. 427 U.S. at 129. The only reasonable implication that can be drawn from the Court's analysis and disposition in *Hopkins* is that if Hopkins were found on remand to be an "appointed" employee, rather than a service contract employee, there was no contractual relationship on which Tucker Act jurisdiction could be based. *Hopkins* thus leaves no room for the court of appeals' theory that although "the *commencement* of [respondent's] employment [was] pursuant to 'appointment,'" his continued employment was governed by an implied-in-fact contract that the AAFES would adhere to its regulations in its dealings with him (App. A, *infra*, 8a).[8]

[8] *Hopkins* was subsequently settled by the parties prior to the Court of Claims' decision on remand. However, the Court of Claims has since decided two cases in accordance with the teachings of this Court's decision in *Hopkins.* In *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976), a discharged AAFES employee sued for back pay. While recognizing that the employee could have held his position either by appointment or by contract, the Court of Claims concluded that since the complaint had averred no facts that established a contract relationship, the court was without jurisdiction to entertain the suit. See also *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977).

2. Moreover, the court of appeals' ruling that the AAFES' failure to follow its own regulations in discharging respondent affords a basis for seeking money damages under the Tucker Act is also incompatible with this Court's decision in *United States* v. *Testan*, *supra*. In *Testan*, two Department of Defense trial attorneys claiming that their positions had been erroneously classified under pertinent Civil Service regulations sued the United States in the Court of Claims for money damages for the period of their allegedly wrongful classifications. They argued that "the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages." 424 U.S. at 400. This Court, however, rejected that argument. It held that the Tucker Act is merely jurisdictional and does not create any substantive right enforceable against the United States, and that none of the statutes that the plaintiffs claimed had been violated by their allegedly improper classifications contained an express provision for an award of monetary relief to a person who has been erroneously classified. Subsequently, in *Hopkins*, the Court noted that Hopkins' alternative contention that he had an enforceable claim under the Tucker Act because his discharge was in violation of both executive regulations and due process principles was directly foreclosed by *Testan*. 427 U.S. at 130. In light of the ruling in *Testan*, it is not sufficient under the Tucker Act for a plaintiff such as respondent to claim that he was deprived of a right granted by a constitutional provision, a statute or a regulation; the provision upon which the claim is founded must create a substantive right to monetary compensation from the United States.

By resorting to the fiction of an "implied-in-fact" contract, the court of appeals in the instant case has permitted respondent to bring a monetary claim against the AAFES under the Tucker Act premised solely upon allegations that in discharging respondent the AAFES failed to adhere to its own procedural regulations governing employee discharges. This approach cannot be reconciled with the Court's admonition in *Testan* that "the grant of a right of action must be made with specificity." 424 U.S. at 400. The jurisdictional grant in the Tucker Act amendment is limited to "express or implied contract[s]" with the military exchanges; that provision cannot logically be read more broadly than the jurisdictional grant construed in *Testan*, which permits the Court of Claims to entertain suits against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," as well as upon "any express or implied contract with the United States." 28 U.S.C. 1491. Thus, if, as the Court held in *Testan*, an agency's alleged violation of its employment regulations does not state a cause of action cognizable under the Tucker Act where appointed federal employees are concerned, it follows that a military exchange's alleged violation of its employment regulations does not state a cause of action cognizable under the Tucker Act amendment where appointed exchange employees are concerned.

To be sure, the court of appeals construed respondent's complaint as alleging a breach of an implied-in-fact contract, whereas the plaintiffs in *Testan* did not rest their claims on a contract theory. 424 U.S. at 400. But, as we have already shown (see pages 8-9, *supra*), the decision in *Hopkins* precludes respondent from asserting a cause of action in contract

against the United States for money damages based on an allegedly wrongful discharge.

In any event, from the standpoint of Tucker Act jurisdiction, the AAFES regulations that the court below construed to establish an "implied-in-fact" contract are subject to the same fatal flaw as the Classification Act and Back Pay Act provisions considered in *Testan*. The regulations prescribe procedures to be followed by the AAFES in the hiring and firing of its employees, but they do not provide that the AAFES will be liable in damages for any failure to abide by the prescribed procedures. An "implied-in-fact" contract, as the court of appeals recognized (App. A, *infra*, 8a-9a, quoting *Porter* v. *United States*, 496 F.2d 583, 590 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975)) is one "founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of their surrounding circumstances, their tacit understanding." No "tacit understanding" to the effect that employees discharged in contravention of AAFES regulations will be entitled to back pay and other monetary relief can be inferred from the AAFES regulations in question.[9] Moreover, any such understanding is negated

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[9] The court of appeals cited only one case—*Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 521 (5th Cir. 1948)—as direct authority for the proposition that the AAFES regulations were part of an implied-in-fact contract between respondent and the AAFES that gave respondent the right to sue for damages under the Tucker Act (App. A, *infra*, 8a). But in that case, which was decided prior to *Testan*, the regulations in question expressly provided for the payment of subsidies to individuals who complied with certain provisions of the Federal Soil Conservation and Domestic Allotment Act. The court in *Aycock-Lindsey* did not suggest that a Tucker

by the statutory exception of AAFES employees from the coverage of the Back Pay Act effectuated by 5 U.S.C. (Supp. II) 2105(c) (see page 6 and note 5, *supra*). The court of appeals' holding that a discharge in violation of AAFES regulations creates a cause of action for breach of an implied-in-fact contract cognizable under the Tucker Act amendment is therefore clearly wrong.[10]

In sum, if the court of appeals' decision is permitted to stand, it will render the United States liable for monetary claims by numerous appointed military exchange employees even though there is no evidence that Congress, in amending the Tucker Act, consented to suit on such claims.[11] Because the decision below

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Act remedy on an implied-in-fact contract theory could be based on an agency's failure to abide by regulations that made no reference to money payments.

[10] In addition, the court's reliance (App. A, *infra*, 9a) on the equitable principle that "a federal agency is bound to follow its regulations where the rights of individuals are affected" is misplaced. It is well settled that the right to sue the United States under the Tucker Act on a contract claim must rest upon the existence of a contract express or implied in fact, and not on a contract based merely on equitable considerations and implied in law. See, *e.g.*, *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287, 293 (1928); *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926).

[11] The number of persons employed by the military exchanges is substantial. In 1969, for example, the AAFES ranked third in total merchandising operations behind Sears, Roebuck & Company and J.C. Penney Company, with sales in excess of $3.5 billion. In 1976, AAFES had more than 3,000 retail outlets and more than 10,000 other types of facilities, including auto repair, customer service, vending fa-

is directly contrary to this Court's rulings in *United States* v. *Hopkins*, *supra*, and *United States* v. *Testan*, *supra*, we believe that summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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cilities and movie theaters. See *Champaign-Urbana News Agency, Inc.*, v. *J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980).

APPENDIX A

No. 79-1471

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

June 27, 1980

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

The sole issue on this appeal is whether the district court has been vested with subject matter jurisdiction to adjudicate a suit filed by Arthur Sheehan against the Army and Air Force Exchange Service ("AAFES") based upon wrongful discharge from employment. The lower court dismissed for want of subject matter jurisdiction. We reverse and remand because we are persuaded that the lower court did not lack jurisdiction.

I. *The Facts and Procedural Posture*

On March 16, 1976, Sheehan was an employee of the AAFES serving as Shopping Center Manager for

the Fort Jackson Exchange in South Carolina. On that date, he received advance written notice of separation based upon conduct off the job that allegedly reflected discredit on the AAFES and that rendered his retention incompatible with the best interests of the AAFES. The letter was signed by James Stapleton, General Manager of the Piedmont Area Exchange, but since Sheehan was then serving in a special program identified as the Executive Management Program ("EMP"),[1] prior approval for the dismissal was obtained from the Commander of the AAFES, General Hospelhorn.[2] Sheehan's written re-

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[1] The EMP is intended to fulfill the continuing requirements of the AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of the AAFES. EMP employees incur special obligations and enjoy specific benefits not available to non-EMP employees of the AAFES. Army Reg. 60-21/Air Force Reg. 147-15 ("AR 60-21/AFR 147-15"), c. 5, § II, ¶¶ 5-6, 5-9 (Nov. 12, 1974). One of the benefits enjoyed is longer notice periods, based upon length of service, in the case of certain separations. *Id.* at ¶ 5-9, Appendix.

[2] The regulations regarding authority to dismiss an EMP employee for cause are cumbrous, and are not the model of clarity. Exchange Service Bulletin ("ESB") No. 247 (July 2, 1975) ¶ 13 provides, in pertinent part:

> An employee may be separated for cause by the official with authority to separate the employee [AR 60-21/AFR 147-15 Section II, Chapter 1]. . . .

Chapter 1, Section II of AR 60-21/AFR 147-15 grants express authority to separate AAFES employees only on the basis of retirement, and this power is granted to the commander of the AAFES. AR 60-21/AFR 147-14, c. 1, § II, ¶ 1-9e. However, the Commander is also vested with the authority to develop personnel policies, *id.* at ¶ 1-9b, to administer the EMP program, *id.* at ¶ 1-9c, and to administer the

sponse to the March 16, 1976 letter proved ineffective and Stapleton signed a letter of final termination dated April 16, 1976. Sheehan pursued administrative appeal[3] and convinced the hearing examiner that his conduct had not reflected discredit on the AAFES and that his retention was not contrary to

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AAFES program worldwide, *id.* at ¶ 1-9d. Presumably, these powers include dominion over the discharge of EMP employee of the AAFES. This interpretation is reinforced by the definitional section of ESB No. 247. Paragraph 7n of that Bulletin provides, in relevant part:

> n. Management official: Except as provided below, the management official is the official with authority to separate at the AAFES organizational element . . . to which the employee is assigned.
>
> (1) If the employee is an EMP employee . . . who is . . . separated by the Commander, AAFES, the management official is the Commander AAFES.

The Commander is likewise empowered to delegate his authority in writing. AR 60-21/AFR 147-14, c. § II, ¶ 1-10.

A redelegation of power to dismiss EMP employees had apparently already been authorized because ¶ 7c(3) of ESB No. 176 (July 29, 1974), which was signed on behalf of the Commander, provides, in pertinent part:

> Proposed involuntary separations of all Executive Management Program (EMP) employees . . . that are not initiated by the Commander, AAFES, will be subject to the *prior approval* of the Commander, AAFES . . . . (emphasis in original)

The necessity for obtaining the prior approval of the Commander of the AAFES, for involuntary dismissals of EMP employees when the discharge was not initiated by him, was reaffirmed less than a month after Sheehan received his letter of final termination. ESB No. 299 ¶ 8c(3) (May 10, 1976).

[3] ESB No. 247 ¶ 86 (July 2, 1975) permits appeal of separations for cause pursuant to ¶¶ 81-98 of that directive.

the best interests of the AAFES. However, the Commander of the AAFES, General Hospelhorn, acting in the capacity of Appellate Authority, disagreed with the hearing examiner and denied the appeal. He informed Sheehan that the decision was final and was not subject to further appeal or review. In January of 1978, Sheehan petitioned for reconsideration, but this effort eventually proved barren when the Chairman of the Board of the AAFES denied his appeal.

Relief was sought in the district court. The complaint alleged that Sheehan had been denied a free and impartial appeal, because General Hospelhorn gave prior approval for the discharge and also served as Appellate Authority in deciding Sheehan's administrative appeal, in derogation of AAFES regulations[4] and procedural due process. General Hospelhorn's decision in denying the appeal was also assailed as arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, in excess of statutory authority, and contrary to Sheehan's constitutional rights. Sheehan's prayer for relief sought reinstatement; back pay; other concomitants of employment, including accrued vacation time, sick leave, and retirement benefits; expenses incurred in seeking alternative employment; damages for mental anguish; punitive damages; court costs; and attorney fees.

The district court ruled that it lacked subject matter jurisdiction and granted the AAFES' motion to

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[4] ESB No. 247 ¶ 97a (July 2, 1975) provides that, ordinarily, the Commander of the AAFES is to serve as Appellate Authority. However, when he is the management official, *see* note 2, *supra*, the Appellate Authority is to be the Chairman of the Board of Directors, Army and Air Force Exchange and Motion Picture Services.

dismiss. On appeal, Sheehan argues that the court had jurisdiction under 28 U.S.C. §§ 1331(a), 1346(a)(2), and 1361 (1976). For the reasons stated below, we think the court possessed subject matter jurisdiction.

II. *The Jurisdictional Problem*

Subject matter jurisdiction in the federal court ordinarily involves an examination of the constitutional limitations in Article III and congressional statutory grants of power. When suit is brought against the federal government, however, sovereign immunity, unless waived, operates as a bar to the action in the nature of an additional limitation on the court's subject matter jurisdiction. *United States* v. *Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 587-88, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941). A suit against the AAFES is considered a suit against the United States because this nonappropriated fund instrumentality[5] is an "arm[] of the government deemed by it essential for the performance of governmental functions . . . and partake[s] of whatever immunities it may have under the constitution and federal statutes." *United States* v. *State Tax Commission of Mississippi*, 421 U.S.

[5] A nonappropriated fund instrumentality is one that does not receive its monies by congressional appropriation. *United States* v. *Hopkins*, 427 U.S. 123, 125 n.2, 96 S.Ct. 2508, 2510, 49 L.Ed.2d 361 (1976). The AAFES was created and is administered under the general authority vested in the Secretaries of the Army and Air Force by 10 U.S.C. §§ 3012 and 8012 (1976). Absent special legislation, however, the federal government does not assume the obligations of the exchange services in the manner that contracts entered into by appropriated fund agencies are assumed. *Hopkins*, 427 U.S. at 127, 96 S.Ct. at 2511.

599, 606, 95 S.Ct. 1872, 1877, 44 L.Ed.2d 404 (1975); *see Young* v. *United States*, 498 F.2d 1211, 1215 (5th Cir. 1974); *cf. Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, 485, 62 S.Ct. 1168, 1170, 86 L.Ed. 1611 (1942) (nonappropriated fund post exchanges are arms of the government). Because no constitutional infirmity to the assumption of jurisdiction is implicated here, we turn our attention to statutes which bestow subject matter jurisdiction in the traditional sense and those that waive sovereign immunity.

III. *The Tucker Act*

28 U.S.C. § 1346(a)(2)[6] confers subject matter jurisdiction on the district courts in civil actions against the United States, where the amount claimed does not exceed $10,000,[7] and that, *inter alia*, are

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[6] That section provides, in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

[7] Actions seeking more than $10,000 in damages lie within the exclusive jurisdiction of the Court of Claims. *A. L. Rowan & Son, General Contractors, Inc.* v. *Department of Housing and Urban Development*, 611 F.2d 997, 999 (5th Cir. 1980); *Jones* v. *Alexander*, 609 F.2d 778, 780 (5th Cir. 1980). Although Sheehan did not limit his prayer for mone-

founded upon an express or implied contract with the federal government. The 1970 amendment to this statute provides that for purposes of the statute, express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES, are considered to be express or implied contracts with the United States. This section also operates as a waiver of sovereign immunity for the enumerated genre of suits. *A. L. Rowan & Son, General Contractors, Inc.* v. *Department of Housing and Urban Development*, 611 F.2d 997, 999 (5th Cir. 1980).

Sheehan argues that an implied contract of employment existed between the AAFES and himself. The AAFES counters with the argument that gov-

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tary relief to $10,000, during oral argument his counsel moved to amend the complaint and to waive any request for relief in excess of that sum. No objection was entered on behalf of the AAFES.

Although a complaint is fatally defective unless it contains a proper allegation limiting the recovery sought, *see Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975), defective allegations of jurisdiction may be amended on appeal. 28 U.S.C. § 1653 (1976). We have said that this statute is to be liberally construed. *McGovern* v. *American Air Lines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975) (per curiam); *accord Miller* v. *Davis*, 507 F.2d 308, 311 (6th Cir. 1974). Permitting amendment at this stage merely avoids a perfunctory refiling of another complaint which limits the request for monetary relief to $10,000. Time and expense for the parties and labor for court personnel are minimized. *See Mathews* v. *Diaz*, 426 U.S. 67, 75 & n.9, 96 S.Ct. 1883, 1889, 48 L.Ed.2d 478 (1976); *Schlesinger*, 420 U.S. at 744 n.9, 95 S.Ct. at 1306; *Willingham* v. *Morgan*, 395 U.S. 402, 407-08 & n.3, 89 S.Ct. 1813, 1816-17, 23 L.Ed.2d 396 (1969); *Jones*, 609 F.2d at 780-81 (uncontested amendment to complaint under Tucker Act permited on appeal).

erning regulations[8] establish beyond cavil that he served as an appointed employee and did not toil pursuant to contract. We note that although the complaint does not, by its terms, refer to an implied contract, it does charge that the administrative appellate procedure afforded Sheehan, subsequent to his discharge, did not comport with applicable regulations.

Even if the regulations label the *commencement* of Sheehan's employment as pursuant to "appointment," we do not think that ends the inquiry. Other regulations provide that an AAFES employee may be separated for cause only under certain conditions and provide for administrative appeal from the separation decision.[9] These latter regulations manifest the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment. Accordingly, the regulations were part of a collateral implied in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him. *See Aycock-Lindsey Corp.* v. *United States*, 171 F.2d 518, 520-21 (5th Cir. 1948); *cf. Bodek* v. *Department of Treasury*, 532 F.2d 277, 279 n.7 (2d Cir.) (per curiam), *cert. denied*, 429 U.S. 849, 97 S.Ct. 137, 50 L.Ed.2d 122 (1976) (validly enacted regulations are implied part of an express contract). A contract implied-in-fact is one "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of their surrounding circumstances, their tacit understanding." *Porter* v. *United States*, 496

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[8] The AAFES points to AR 60-21/AFR 147-15, c. 2, § I; c. 5, § II (Nov. 12, 1974).

[9] ESB No. 247 ¶¶ 13, 27, 81-98 (July 2, 1975).

F.2d 583, 590, 204 Ct.Cl. 355 (1974), *cert. denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975). That understanding was reinforced by the well-established legal principle that a federal agency is bound to follow its regulations where the rights of individuals are affected. *E.g. Morton* v. *Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959).

The allegation that the discharge violated controlling regulations was, therefore, equivalent to an allegation of breach of an implied-in-fact contract. Such a claim is sufficient to avoid dismissal on jurisdictional grounds. *United States* v. *Hopkins*, 427 U.S. 123, 130, 96 S.Ct. 2508, 2512, 49 L.Ed.2d 361 (1976). Accordingly, the lower court should not have dismissed the suit; it had power to hear the dispute and to award monetary relief pursuant to section 1346 (a)(2).

Section 1346(a)(2) does not, however, confer subject matter jurisdiction on the district court to award nonmonetary cure. *E.g., Lee* v. *Thornton*, 420 U.S. 139, 95 S.Ct. 853, 43 L.Ed.2d 85 (1975); *Jones* v. *Alexander*, 609 F.2d 778, 781 (5th Cir. 1980).[10]

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[10] Some circuit courts have intimated that the district courts may have jurisdiction under section 1346(a)(2) to award equitable relief in the narrow circumstance where it is merely incidental to and in aid of a primary request for monetary succor. *Werner* v. *United States Department of Interior, Fish and Wildlife Service*, 581 F.2d 168, 171 (8th Cir. 1978); *Larionoff* v. *United States*, 533 F.2d 1167, 1181 (D.C.Cir. 1976); *aff'd* 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977). Assuming *arguendo* that such an exception does obtain, it is inapplicable because the principal relief sought here is reinstatement and restoration of employment benefits. It cannot be said that the nonmonetary remedy is merely incidental to or in aid of Sheehan's claim for monetary relief.

The source of that power must be found in other statutes.

IV. *General Federal Question Jurisdiction*

28 U.S.C. § 1331(a) (1976)[11] confers subject matter jurisdiction on the district courts for actions which arise under the Constitution and laws of the United States. Ordinarily, at least $10,000 must be at stake, but after the 1976 amendment to this statute, the monetary limitation does not pertain to suits against an agency of the federal government. Although the complaint did not specify this provision as a basis of jurisdiction, if the facts alleged meet the limitations, the lower court had jurisdiction notwithstanding the omission. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975).

Sheehan's complaint alleged procedural due process violations, arbitrary and capricious action constituting an abuse of discretion (presumably in contravention of substantive due process), and that Hospelhorn's denial of the appeal infringed other constitutional and statutory protections. The charge that appellate review by Hospelhorn violated governing regulations also arises under the "laws" of the United

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[11] That section provides:

(a) The district courts shall have original juridiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

States. *Chasse* v. *Chasen*, 595 F.2d 59, 61 (1st Cir. 1979); *Spencer* v. *Laird*, 442 F.2d 904, 906 (2d Cir. 1971); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 7-8 (3d Cir. 1964). Federal question jurisdiction under section 1331(a) is triggered by these allegations because they are not "*so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978), *quoting*, *Hagans* v. *Lavine*, 415 U.S. 528, 542-43, 94 S.Ct. 1372, 1381-82, 39 L.Ed.2d 577 (1974) (emphasis in the original).

Nevertheless, section 1331(a) is not a waiver of sovereign immunity. *Beale* v. *Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972). Sheehan must look to 5 U.S.C. § 702 (1976)[12] for the waiver. The 1976 amendment

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[12] That section provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

to that statute waives sovereign immunity for actions against federal government agencies, seeking non-monetary relief, if the agency conduct is otherwise subject to judicial review.

We are cognizant of the fact that the Second Circuit has recently held that section 702 does not waive the bar of sovereign immunity for nonstatutory review of agency action under section 1331. *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978). Nevertheless, we find the illumination of the legislative history of section 702 by the Third Circuit in *Jaffee* v. *United States*, 592 F.2d 712, 718-19 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979), cogent. We too must respectfully part with the Second Circuit and hold that Congress did intend to waive the defense of sovereign immunity for nonstatutory review under section 1331. *Accord, Collyard* v. *Washington Capitals*, 477 F.Supp. 1247, 1252-53 (D.Minn. 1979).

However, the AAFES argues that the 1970 amendment to 28 U.S.C. § 1346 (1976), which provided that express or implied contracts with the AAFES are to be considered as contracts with the United States, impliedly prohibits jurisdiction under 28 U.S.C. § 1331(a) (1976) and 5 U.S.C. § 702 (1976). It argues that in enacting that amendment, Congress believed that it was extending the sole vehicle for suit against the AAFES. Reliance is then placed on *Brown* v. *General Services Administration*, 425 U.S. 820, 828-29, 96 S.Ct. 1961, 1965-66, 48 L.Ed.2d 402 (1976), and other cases, for the proposition that this

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(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

belief, even if erroneous, impliedly prohibits relief under clause (2) in section 702.

We do not find this argument persuasive. The AAFES has not pointed us to any authority that indicates that Congress' purpose in enacting the 1970 amendment was to provide the only method for suing the AAFES. Indeed, *Hopkins*, 427 U.S. at 125, 96 S.Ct. at 2510, states that the purpose was to clarify that the fact that the government has not assumed the obligations of the enumerated nonappropriated fund instrumentalities does not prevent suit against them from being suits against the United States. Thus, after *Hopkins* it was clear that actions for breaches of contract seeking monetary relief were to be cognizable in the Court of Claims (and in the district courts if the sum involved did not exceed $10,000). But, we have no indicia of congressional belief regarding the maintainability of suits against AAFES for *nonmonetary* relief at the time the amendment was before Congress. Consequently, we do not find the enactment to be preclusive under a *Brown* syllogism.

It is clear that the legislative history to section 702 indicates that Congress did not intend to expand the waiver of sovereign immunity in the Tucker Act.[18]

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[18] H.R. Rep. No. 1656, 94th Cong., 2 Sess. 12-13, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6121, 6133 indicates that:

> Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for con-

When suit is premised solely on that Act, section 702 cannot expand the jurisdiction and waiver under 28 U.S.C. § 1346(a)(2) to permit the award of nonmonetary relief in the district court. Conversely, when suit is brought under statutes other than the Tucker Act seeking a nonmonetary remedy for violation of the national Constitution and laws, the limited grant of jurisdiction and waiver of sovereign immunity found in that Act does not expressly or impliedly prohibit the suit. *See Neal* v. *Secretary of Navy*, 472 F.Supp. 763, 773-75 (E.D. Pa. 1979).[14]

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tract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims. (footnotes omitted).

[14] *Lee* v. *Blumenthal*, 588 F.2d 1281 (9th Cir. 1979) and *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932-34 (2d Cir. 1978) may conflict, to a certain extent, with this view. Those cases involved suits seeking to compel the government to redeem "Flower Bonds." However, the value at stake in both those cases far exceeded the $10,000 limitation on jurisdiction in the district courts under § 1346(a)(2). A suit seeking a judgment for damages for breach of the bond contract, which would have been functionally equivalent to a judgment ordering redemption, would have to have been brought in the Court of Claims. Exercise of jurisdiction on those facts would have the pernicious effect of undermining the exclusive jurisdiction of the Court of Claims. *Cf. Carter* v. *Seamans*, 411 F.2d 767, 774-75 (5th Cir. 1969), *cert. denied* 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970). (Declining to exercise

In this instance, nonmonetary relief is available under a jurisdictional grant in 28 U.S.C. § 1331(a), and that statute is not a waiver of sovereign immunity and contains no express or implied interdiction against nonmonetary relief.

V. *Mandamus*

28 U.S.C. § 1361 (1976)[15] confers subject matter jurisdiction for actions in the nature of mandamus to compel a federal agency to perform a duty owed to the plaintiff. The statute is also a waiver of sovereign immunity. *Huffstutler* v. *Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979) (per curiam); *Beale*, 461 F.2d at 1138.

Three elements must exist, however, before mandamus is appropriately exercised: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available. *Jones*, 609 F.2d at 781; *Winningham* v. *United States Department of Housing and Urban Development*, 512 F.2d

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mandamus jurisdiction so as not to interfere with the exclusive jurisdiction of the Court of Claims). In fact, in *Lee*, one of the reasons articulated for the reluctance "to accept this action as pleaded" was the equivalence of the remedies of damages and an order to redeem.

[15] That section provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

That this section cannot serve as a jurisdictional basis for Sheehan's unliquidated monetary claim is evident from *Spaulding* v. *Nielsen*, 599 F.2d 728, 730 (5th Cir. 1979) (per curiam).

617, 620 (5th Cir. 1975). With regard to this final factor, the alternative remedy must be capable of affording full relief as to the subject matter in question. *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970). Since we hold that Sheehan can maintain his suit for both monetary and nonmonetary relief under alternative statutes, the lower court did not possess mandamus jurisdiction.

VI. *Summary*

We have concluded that the district court possesses subject matter jurisdiction to decide this controversy. Power to provide monetary relief is found in the Tucker Act, 28 U.S.C. § 1346(a)(2), and authority to award nonmonetary compensation flows from the confluence of 28 U.S.C. § 1331(a) and 5 U.S.C. § 702. This holding precludes the existence of mandamus jurisdiction in the district court. We travel no further and should not be understood to intimate any opinion on the merits.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT

[Filed Jan. 15, 1979]

ORDER

CAME ON for consideration this date, Defendant's Motion to Dismiss or In the Alternative for Summary Judgment in the above styled and numbered cause, and after carefully reviewing the administrative record herein as well as the pertinent authorities advanced by the Defendant in support of its Motion to Dismiss,

IT IS ORDERED that Defendant's Motion to Dismiss be and the same is hereby granted for the reason that the Court finds and concludes as a matter of law, pursuant to Federal Rule of Civil Procedure, Rule 12(b) that the Court lacks subject matter jurisdiction over the instant action. Accordingly the above-styled and numbered cause is ordered dismissed and is to be removed by the Clerk from the docket of this Court.

SIGNED on January 15, 1979.

/s/ Robert W. Porter
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1471

D. C. Docket No. 3-78-0222-F

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order

of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 27, 1980

Issued as Mandate: Jul. 23, 1980.

Reissued as Mandate: October 8, 1980.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1471

ARTHUR EDWARD SHEEHAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE, AN INSTRUMENTALITY OF THE DEPARTMENTS OF THE ARMY AND OF THE AIR FORCE, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

[Filed Sep. 26, 1980]

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Opinion 6-27-80, 5 Cir., 198—, —— F.2d ——)

(September 26, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit

Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

Form 704-2

APPENDIX E

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (NOVEMBER 12, 1974) provides in pertinent part:

* * * * *

1-7. Status of employees. *a.* AAFES personnel are Federal employees of an instrumentality of the United States within the Department of Defense.

* * * * *

1-9. Personnel authority. *a.* The authority to establish personnel policy is vested in the Board of Directors, Army and Air Force Exchange and Motion Picture Service, hereinafter referred to as the Board of Directors.

* * * * *

f. The authority to appoint and promote AAFES employees with or to grades designated above USP 15 is vested in the Board of Directors.

* * * * *

g. Authority must be exercised in accordance with this regulation and procedures published by the Commander, AAFES.

* * * * *

2-2. Appointment criteria. *a.* To be considered for appointment, an individual must submit a complete and accurate application for employment reflecting that the individual meets the minimum requirements for the position under consideration.

* * * * *

2-3. Appointment. *a.* After selection of an individual for appointment, but prior to official appointment, each individual must submit the following:

(1) Evidence that he is in satisfactory physical condition, if requested. The appointing authority may, if he deems it advisable, require a medical certification or physical examination at AAFES expense.

* * * * *

c. Official appointment will be effective upon issuance to the individual of a copy of a properly executed AAFES personnel action. The effective date of appointment will be the date indicated on the personnel action.

d. Appointments are considered probationary for the periods specified below and these periods may not be extended.

(1) Positions paid under the Universal Salary Plan, management trainee program and college trainee program—1 year.

(2) All other positions—90 days.

e. Employees will not be appointed to part-time, temporary or on-call employment for the purpose of determining the employee's suitability for regular full-time employment.

f. Employees will be appointed to step 1 of the grade assigned to the position the employee will occupy, except that:

(1) Employees with special qualifications or experience may be appointed to step 2.

(2) Employees who will require further training may be assigned to a lower grade, in accordance with the provisions on training assignment in section I, chapter 4.

(3) Upon specific approval by the Commander, AAFES, an employee can be appointed to a step higher than step 2.

* * * * *

2-12. Employee utilization, payment, and benefits. *a.* Regular full-time, regular part-time, temporary full-time, temporary part-time, and on-call employees will be utilized to perform approved standard and non-standard jobs. Casual employees may be utilized to fill unskilled non-recurring jobs.

b. Payment may be made—

(1) In accordance with the Universal Salary Plan, Hourly Pay Plan, or Commission Pay Plan for all employees, except casual employees. To regular part-time employees, in accordance with the Universal Salary Plan, if approved by the Commander, AAFES.

(2) In accordance with the terms of the contract when the employee is hired pursuant to an employment contract.

* * * * *

3-4. Verbal reprimand. *a.* A verbal reprimand may be given by the employee's supervisor based upon any of the following:

(1) Failure to adequately perform his job as set out in the employee's job description.

(2) Conduct on the job involving insubordination, violation of laws, regulations, rules or procedures, or other conduct incompatible with maximum employee efficiency.

(3) Conduct off the job reflecting discredit on AAFES.

* * * * *

3-8. Separation for cause. An employee may be separated for cause (sec. II, this chap.) by the official with authority to separate the employee (sec. II, chap. 1) on the basis of conduct specified in paragraph 3-4*a*(2) or (3) when—

a. Other disciplinary actions and/or counseling are determined to be inappropriate, or

b. Other disciplinary actions and/or counseling have been utilized without apparent success, and

c. The act of misconduct or delinquency is of such a nature or so repetitious that retention of the employee in any capacity is determined to be incompatible with the best interests of AAFES.

* * * * *

EXCHANGE SERVICE BULLETIN NO. 247 (15-52) (JULY 2, 1975) provides in pertinent part:

* * * * *

ADVERSE ACTIONS AND ADMINISTRATIVE APPEALS

81. The provisions of this directive pertaining to adverse actions and administrative appeals apply to regular full-time and regular part-time employees.

82. The advance notice of an adverse action will be in writing and will:

a. Identify the specific adverse action contemplated.

b. State the effective date of the action contemplated, which will be no earlier than 30 calendar days following the employee's receipt of the advance notice.

c. State specifically and in detail the reasons for the adverse action contemplated, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

d. Advise the employee of his right to reply, orally, and/or in writing, and to submit affidavits in support of his reply. The employee will be afforded an opportunity to be accompanied by a representative during his oral reply if he so requests. Any expenses involved in making an oral reply will be borne by the

employee. He will be permitted to make any presentations he feels are relevant and should be considered before the final decision. The right of reply does not include the right to a hearing with testimony from witnesses for both sides of the controversy, but is an opportunity for refutation of the advance notice. When a reply is made orally, a written record will be made and, if possible, the signature of the employee will be added as an indication that he agrees with its accuracy.

e. Identify the official to receive the written or oral reply.

f. Advise the employee that the reply must be filed within five workdays of receipt of the advance notice of the proposed action but that, upon good cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed 10 workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Advise the employee that his reply to the advance notice of adverse action will be given full consideration before a final decision is made.

h. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a written final decision will be made following expiration of the authorized reply period.

83. Within 10 workdays of receipt of the employee's reply and after giving full consideration of the employee's reply or, if no reply is received, on the day following expiration of the authorized reply period, the official taking the action will make a final

decision. If the decision is to withdraw the action, the employee will be notified in writing. If the decision is adverse to the employee, whether it is to take the same action originally contemplated or a less severe action, the employee will be advised of the action to be taken. (If the official taking the action has made a decision to impose a less severe action, a new advance notice is not necessary.) The final decision will be in writing and will:

a. Reference the advance notice of adverse action.

b. Advise the employee, if a reply was received, that full consideration was given to his oral and/or written reply; or if no reply was received, state that no reply was received.

c. State the action to be taken and the paragraph of this directive under which it is being taken.

d. State the basis for the action and which of the reasons in the advance notice of proposed action were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

e. State the effective date of the action (which must be at least 30 calendar days from the date the employee received the advance notice of the action).

f. State that this is the official's final decision.

g. State that, within 21 calendar days of the receipt of the final decision, the employee may initiate, under the provisions of this directive, an appeal of the action taken. Any appeal submitted must contain a statement that the employee either does or does not desire an evidentiary hearing. The employee should also be advised that assistance on the format and procedures involved in filing the appeal may be obtained from the servicing personnel office.

h. Advise the employee of his right to be represented by counsel or any other individual secured by the employee at his expense in presentation of his appeal.

84. The final decision will be furnished the employee by one of his supervisors. The time and date of delivery will be noted on a copy to be retained by the official making the final decision. If the employee is absent, the final decision will be sent to him at the last-known address by certified mail, return receipt requested.

85. An appeal from a final decision must be submitted within 21 calendar days of the employee's receipt of the written final decision. Upon request, the appellant will be provided assistance by the servicing personnel office in preparing a written appeal. Neither the appellant nor his representative will be intimidated or coerced in an effort to discourage the appellant from exercising his right to appeal, nor will an appellant or his representative be discriminated against or reprisals be taken because of the exercise of such right. If the appellant chooses to be represented by an AAFES employee, and if the employee selected by the appellant consents and is determined, by appropriate authority, to be reasonably available, such employee will be made available. If an AAFES employee is so designated, he may have reasonable time off from his duties for the purpose of representing the appellant. AAFES employees assigned to the office of the General Counsel, to personnel duties, or to security duties may not serve as the appellant's representative. Appellants may not have more than two representatives including legal counsel. If the appellant has two representatives, one must be designated as his lead representative.

86. Disciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Suspension without pay for more than 30 calendar days.

b. Separation for cause.

c. Withdrawal of EMP status, except for declination of transfer or for unsatisfactory performance.

87. Nondisciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Downgrade or reduction in compensation except terminations of temporary promotions, terminations of details, or as a result of rehire.

b. Separation for RIF.

c. Separation for disability or for maternity.

d. Downgrade or reduction in compensation for unsatisfactory performance.

e. Withdrawal of EMP status for unsatisfactory performance.

f. Separation for unsatisfactory performance.

88. The adverse actions set out in paragraphs 86 and 87 above are the only adverse actions from which an employee may appeal under the procedures prescribed in paragraphs 81 through 98 of this directive. Except for the adverse actions set out in 87d, e and f above, appeals from nondisciplinary actions may be made only on the basis of procedural errors or discrimination, other than discrimination which would be a basis for consideration under equal employment opportunity procedures.

89. If an employee desires to appeal an adverse action, he must address his appeal to the appellate authority through the official making the final decision

and the management official, if they are not one and the same. The appeal may contain affidavits, documentary evidence and arguments in support of the employee's appeal; and must contain a statement that the appellant does or does not desire an evidentiary hearing. The name and address of the appellant's representative, if any, must also be stated in the written appeal. The appellant must state the basis for his appeal in sufficient detail to permit a hearing examiner to understand the basis. He must also state the remedy requested, which must be personal to him. The issues to be brought before a hearing will be limited to those set forth by the appellant in his written appeal; however, the appellant may, by letter received by the hearing examiner 10 or more workdays prior to the date set for the convening of the hearing on the appeal, amend his appeal to add new issues. A copy of any letter amending an appeal must also be sent to the management official at the same time it is mailed or delivered to the hearing examiner.

90. Upon receipt of an appeal from an adverse action, the management official will, within five workdays of receipt of the appeal, forward the entire file to the hearing examiner. The file forwarded will include the appeal, together with all evidence submitted by the appellant, the evidence upon which the final decision to take the adverse action was based, and a copy of the final decision notifying the appellant of the adverse action.

91. Upon receipt of an appeal from an adverse action, the hearing examiner will ascertain whether the appeal is in accordance with the requirements of paragraphs 81 through 98 of this directive. If it is ascertained that the appeal does not comply with these

requirements, the hearing examiner will return the appeal to the appellant with a written explanation as to why it was not accepted and, where applicable, refer to the paragraph or paragraphs of this directive that are the basis for not accepting the appeal. The appellant will be given five workdays from date of receipt of the hearing examiner's letter to resubmit his appeal. If the employee fails to resubmit his appeal within five workdays, the appeal will be considered withdrawn. The determination of the hearing examiner regarding acceptance of an appeal is final and not subject to further appeal or review. The determination of the hearing examiner will be forwarded through channels to the employee with a copy to the management official and to the official making the final decision.

92. If the employee does not affirmatively request an evidentiary hearing, a recommendation on the appeal may be rendered by the hearing examiner on the relevant evidence submitted. However, the hearing examiner may request additional evidence from either the appellant or the official making the final decision prior to making a recommendation.

93. If the employee affirmatively requests an evidentiary hearing or if the hearing examiner determines that an evidentiary hearing is necessary, a hearing will be conducted by a hearing examiner.

94. *Preparating* [sic] *for hearing.* The management official will select an individual to prepare and present the case for management. The appellant and the management official will notify the hearing examiner in writing of the names and addresses of their representatives in advance of the hearing.

a. The management official will provide facilities, including recording equipment and a court reporter

or stenographer, as determined necessary by the hearing examiner, and will perform other related functions as prescribed by the Commander, AAFES.

b. The hearing examiner is authorized to consult with the appellant and the management official and/or their representatives on an informal basis in advance of the hearing in order to clarify the issues, attempt an informal resolution, secure agreement as to certain undisputed facts, and attempt to narrow the issues to be considered during the hearing.

95. *Hearing examiners.* A hearing examiner will be responsible for establishing the date, time, and place of the hearing, and for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Such notice will include: the date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both the appellant and management to produce evidence in their behalf in documentary form, or by testimony of witnesses; a statement of the right of both the appellant and management to secure assistance and information from the servicing personnel office; and a statement advising the appellant of his right to have representation and his responsibility in arranging for that representation.

a. The hearing examiner will conduct the hearing in accordance with procedures prescribed and published by the Commander, AAFES. The functions of the hearing examiner are to identify the issues involved, to ascertain and acquire all relevant facts, to evaluate and weigh those facts, to make findings of fact, and to render a written recommendation on the appeal to the appellate authority. The hearing ex-

aminer will prepare a record of the hearing which will include a verbatim transcript or, at his option, a summarized record of the hearing, a statement of the issues involved, appropriate findings of fact and a written recommendation, including recommendations for corrective action where required.

b. Evidence introduced during the hearing will be limited by the hearing examiner to matters material and relevant to the appeal. Strict adherence to the formal rules of evidence will not be required.

c. When all evidence has been obtained, including that contained in the transcript of the hearing when a hearing is conducted, the appeal and evidence will be reviewed by the hearing examiner. Unless further evidence is required, the hearing examiner will make a written recommendation on the merits of the appeal and transmit it to the appellate authority. The hearing examiner may recommend modification, if appropriate, of any action which has been taken. The hearing examiner may recommend appropriate corrective action to facilitate implementation of the recommendation.

96. *Record of hearing.* The transcript of any hearing will be prepared in duplicate. The original will be forwarded to the hearing examiner who conducted the hearing and the duplicate will be forwarded to the management official. A copy will be made available, by the management official, for the use of the appellant. The hearing record will include as a minimum:

a. The request for a hearing.
b. Notice of the hearing.
c. The transcript of the hearing with exhibits.

d. The hearing examiner's report which will include:

(1) A statement of the issues.
(2) A statement of the findings of fact.
(3) The hearing examiner's recommendation.

97. *Appellate authority.* a. The appellate authority is the Commander, AAFES or, in his absence, the Deputy Commander, AAFES. However, if the Commander, AAFES is the management official, the appellate authority will be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services.

b. The appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination except that, when the Chairman of the Board of Directors is the appellate authority, he will secure the legal advice of the Judge Advocate General of the Army or of the Air Force, as appropriate, prior to rendering his determination.

98. *Determination by appellate authority.* The appellate authority will render a written determination on the appeal. The appellate authority may approve, disapprove, or amend the recommendation of the hearing examiner; return the case for further hearing; or return the case for corrective action. The written determination will, unless the hearing is to be reopened or unless other corrective action requiring further review is to be taken, include a statement that the determination by the appellate authority is final and not subject to further appeal or review.

a. One copy of the determination will be forwarded to each of the following: the appellant, the hearing examiner, the management official, and any intermediate headquarters, as appropriate.

b. In the event a rehearing or further review is ordered, processing of the appeal will continue in accordance with paragraphs 94 through 98, as appropriate.

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